82-1850

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

Petitioner,

v.

DAN L. JOHNSTON, Polk County Attorney,
and GERALD SHANAHAN, Chief, Division of
Criminal Investigation of the Iowa
Department of Public Safety, State of
Iowa,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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QUESTIONS PRESENTED

1. Whether patrons of a public library are afforded constitutional protection from disclosure of their identities, as borrowers of any of 106 books, to the State pursuant to a preliminary investigation of cattle mutilations?

2. What kind of showing must the State make in order to compel disclosure of the identities of all library patrons who, while exercising their First Amendment rights as incorporated by the Fourteenth Amendment, had ever borrowed any of 106 different books from the public library?

3. Whether the ex parte procedure under Rule 5(6) of the Iowa Rules of Criminal Procedure as interpreted by the Supreme Court of Iowa is unconstitu-

tional because it sweeps too broadly in its impact on First Amendment rights as incorporated by the Fourteenth Amendment when the State, pursuant to a preliminary investigation of cattle mutilations, may under Rule 5(6) without any showing at all, compel disclosure of all library patrons who have at any time borrowed any of 106 different library books?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

The petitioner Board of Trustees of the Public Library of Des Moines, Iowa respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Iowa entered in this proceeding on January

19, 1983 and the order of the Supreme Court of Iowa denying a rehearing which was entered on February 10, 1983.

OPINIONS BELOW

The trial court entered a written unpublished judgment. The opinion of the Supreme Court of Iowa was reported at 328 N.W.2d 50. (A1-A15). The denial of rehearing, unpublished, was by order of Supreme Court of Iowa en banc. (A16-A17).

JURISDICTION

The judgment of the Supreme Court of Iowa was entered January 19, 1983. A timely application for rehearing was filed on February 2, 1983 and was denied on February 10, 1983. By the denial of the petitioner's application for rehearing, the opinion and judgment of the

Supreme Court on January 19, 1983 became the final judgment of the highest court of the State of Iowa.

This petition for certiorari is timely filed within 90 days of the aforesaid denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Fourteenth Amendment.

> Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; ...

First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; . . .

Statutes:

Rule 5(6) of Iowa Rules of Criminal Procedure.

> Investigation by prosecuting attorney. The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense, and in such subpoenas shall direct the appearance of said witnesses before the prosecuting attorney at a specified time and place. Such application and judicial order of approval shall be maintained by the clerk in a confidential file until a charge is filed, in which event disclosure shall be made, unless the court in an in camera hearing orders that it be kept confidential. The prosecuting attorney shall have the authority to administer oaths to said witnesses and shall have the services of the clerk of the grand jury in those counties in which such clerk is regularly employed. The rights and responsibilities of such witnesses and any penalties for violations thereof shall otherwise be the same as a witness subpoenaed to the grand jury.

STATEMENT OF THE CASE

On November 27, 1979, a county attorney's subpoena duces tecum, under Rule 5(6) of the Iowa Rules of Criminal Procedure, was directed to the custodian of records of the Des Moines Public Library. The subpoena was not restricted to time nor did it define with particularity any records or individuals; it directed the custodian of records to appear before the District Court with all records of persons who had checked out any books represented by fifteen different call numbers and one fictional book. The library had one hundred six different volumes represented by the call numbers.

The Des Moines Public Library does not compile information pertaining to who may have used a particular book. Records of transactions are kept only to

determine whether borrowed materials are timely returned. The library would have to review one million, one hundred thirty-nine thousand, one hundred forty-one (1,139,141) transactions if the subpoena had been restricted only to the business year 1978-1979.

The application for the county attorney's subpoena duces tecum stated the purpose of the requested for information is "[t]hat the State of Iowa is currently investigating numerous mutilations of domestic animals" and that "to complete said investigation" the Department of Criminal Investigation and Polk County Attorney's Office need the library records requested.

On November 29, 1979, library patron Steven Brown filed a petition in the District Court for Polk County request-

ing declaratory and injunctive relief naming the Public Library of Des Moines Board of Trustees (hereinafter library board) and Gerald Shanahan as Director of the Division of Criminal Investigation of the State of Iowa as defendants. Subsequently, the library board on November 30, 1979 then filed a petition against Dan L. Johnston, Polk County Attorney, State of Iowa, and Gerald Shanahan. On January 22, 1980, the two actions were consolidated, recasting the library board as a plaintiff.

Steven Brown and the library board argued to the trial court for the following matters: 1) that constitutionally protected rights were violated by the subpoena procedure; 2) that disclosure of the information sought was an unwarranted invasion of the patrons' right to

privacy; 3) that substantial loss of freedom of expression and pursuit of constitutionally protected First Amendment activity would result by the enforcement of the subpoena; 4) there would be a chilling effect upon the exercise of First and Fourteenth Amendment rights.

A hearing was held by the trial court on June 12, 1981. At the hearing, evidence was introduced by the plaintiffs, but the defendants declined to offer any evidence. The trial court filed a final judgment on September 17, 1981, denying the relief sought. An appeal was taken from the Iowa District Court for Polk County to the Supreme Court of Iowa.

Steven Brown and the library board asserted in their appeal to the Supreme

Court of Iowa that federal constitutional rights afforded library patrons protection from disclosure of the information sought. The Iowa Supreme Court addressed the federal constitutional issue and held that a constitutional protected right of privacy in library records does not exist. "The State's interest in well-founded criminal charges and fair administration of criminal justice must be held to override the claim of privilege here." (A14).

The library board, in it's petition for rehearing, asserted that the State had failed to meet the showing necessary under principles of law established by this Court; that the Iowa Supreme Court's interpretation of Rule 5(b) of the Iowa Rules of Criminal Procedure sweeps too broadly in its impact on con-

stitutionally protected rights. The petition was summarily denied. (A16-A17).

REASONS FOR GRANTING THE WRIT

1. The Iowa Supreme Court's interpretation of Rule 5(6) of the Iowa Rules of Criminal Procedure allowing the compelled disclosure of the identities of library patrons will have a chilling effect on the exercise of First Amendment rights of library patrons.

This Court has long recognized that the First Amendment encompasses more than free expression. Not only does it protect the right to disseminate information but also the individual's right to receive information. Martin v. Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Lamont v. Postmaster General, 381 U.S. 301 (1965); Griswold v. Connecticut, 381 U. S. 479 (1965). To hold otherwise would

mean that rights explicitly granted in the Constitution would have no effect. Lamont v. Postmaster General, supra, at 308, (Brennan, J., concurring).

Protection of the right to receive information is essential to having an informed citizenry in the exercise of their First Amendment rights. "The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read [cite omitted] and freedom of inquiry, freedom of thought, and freedom to teach [cites omitted]...." Griswold v. Connecticut, supra, at 482. The Des Moines Public Library provides its patrons the opportunity to exercise their rights to read, to inquire, and to educate themselves. "Teachers and students must

always remain free to inquire, to study and to evaluate, to gain new maturity and understanding...." Sweezy v. State of New Hampshire, 354 U.S. 234 (1957). The exercise of these freedoms, which are essential for all, must be afforded a measure of privacy. In recognition of this, the Board of Trustees of the Public Library, pursuant to a longstanding policy, prohibits the release of information regarding a patron's reading choices.

This Court has recognized a right to anonymity in the exercise of First Amendment rights. NAACP v. Alabama, 357 U.S. 449 (1958); Talley v. California, 362 U. S. 60 (1960). "In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion." Griswold v. Connecticut,

supra, at 483. If the protection of privacy is not afforded, many persons are likely to be inhibited from exercising fully their First Amendment rights.

Conflicts between investigatory needs and First Amendment rights with the concomitant anonymity concerns have already been before the Court. E.g., NAACP v. Alabama, supra; Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); Sweezy v. New Hampshire, 354 U.S. 234 (1957). Moreover in U.S. v. Rumeley, 345 U.S. 41 (1953), the Court recognized without deciding that serious First Amendment concerns were raised when a committee of Congress sought to compel the disclosure of the names of those who had made bulk purchases of books.

The decision below allows the State

to unreasonably interfere with the library patron's constitutionally protected right to read and study the books and periodicals of his or her own choosing. Moreover, the decision subjects the patron's reading interests to scrutiny by the State. The threat of becoming a suspect in an investigation merely because of one's reading choices will chill the exercise of First and Fourteenth Amendment rights.

2. The Iowa Supreme Court's interpretation of the ex parte procedure under Rule 5(6) of the Iowa Rules of Criminal Procedure allowing the compelled disclosure of the identities of library patrons without requiring any showing on the part of the state is in conflict with principles of law established by this Court.

When the state interferes with the exercise of First Amendment rights, it

must first be shown that a compelling state interest exists to justify the interference. NAACP v. Alabama, supra, at 463, citing Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion). Additionally, this Court has held that when a legislative investigation intrudes upon First and Fourteenth Amendment rights, the State must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." Gibson v. Florida Legislative Committee, 372 U.S. 539, 546 (1963). The state must make this same showing in order to compel the disclosure of the identities of the library patrons who have shown a reading interest in particular books.

It is questionable whether the state could show any relationship between cat-

tle mutilations and Religion in the Age of Aquarius, one of the books represented by the call numbers listed in the subpoena. In fact, the state made absolutely no showing at all. The state wholly ignored the principles of law established by this Court.

3. The Iowa Supreme Court's interpretation of Rule 5(6) of the Iowa Rules of Criminal Procedure allowing, pursuant to a preliminary investigation of cattle mutilations, the compelled disclosure of the identities of all persons who have at any time borrowed any of 106 different library books sweeps too broadly in its impact on constitutionally protected rights.

The principle that state action which affects constitutional rights must not sweep too broadly is firmly established. Griswold v. Connecticut, supra; NAACP v. Alabama, supra; Shelton v. Tucker, 364 U.S. 479 (1960); Talley v.

California, supra.

The only purpose served by the subpoena request is the generation of a suspect list comprised of persons who have borrowed books from the public library. The legitimacy of such a purpose is constitutionally suspect. Even when a governmental purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton, supra, at p. 488.

The decision of the court below allows the state under Rule 5(6) of the Iowa Rules of Criminal Procedure to compel public libraries to disclose the reading interests of its patrons by the mere assertion that the information is necessary in its investigation of a

crime. This is in direct conflict with the decisions of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Iowa and the order of that court denying further review.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

STEVEN BROWN, On Behalf of Himself and All Others Similarly Situated,	)	
and	)	Filed January 19, 1983
BOARD OF TRUSTEES OF THE PUBLIC LIBRARY OF DES MOINES, IOWA, Appellants,	)	
vs.	)	451 / 67495
DAN L. JOHNSTON, Polk County Attorney,	)	
and	)	
GERALD SHANAHAN, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, Appellees.	)	

Appeal from Iowa District Court for Polk County, Louis A. Lavorato, Judge.

Plaintiffs' appeal from district court denial of requests for an injunction and declaratory relief against en-

forcement of a subpoena duces tecum AFFIRMED.

Thomas J. McSweeney and Louise M. Jacobs, Assistant Des Moines City Attorneys, for appellant Library Board, and Gorden E. Allen, Des Moines, for appellant Steven Brown.

Thomas J. Miller, Attorney General, Gary L. Hayward, Assistant Attorney General, for appellee Gerald Shanahan, and James Smith, Assistant Polk County Attorney, for appellee Dan L. Johnston.

Considered by Harris, P.J., and McGiverin, Larson, Schultz, and Carter, J.J.

LARSON, J.

This case involves a confrontation between the investigative power of law enforcement authorities and the confidentiality provisions of Iowa Code chapter 68A. At issue is whether a county

attorney subpoena duces tecum for certain library circulation records is limited or restricted by section 68A.7 (13); and if not, whether there exists a constitutionally protected right of privacy in library records, which, when weighed against the public interest in effective criminal investigations balances in favor of the individual library patrons. We answer both questions in the negative and affirm.

This matter began when an agent of the Iowa Division of Criminal Investigation (DCI), who was investigating cattle mutilations in Polk and other counties, visited the Des Moines Public Library in November, 1979. He asked whether certain circulation records were available for inspection. The agent was told that as a matter of library policy, such records were confidential. At the re-

quest of the DCI, the Polk County Attorney, Dan L. Johnston, then applied for and was granted, pursuant to Iowa Rule of Criminal Procedure 5(6), a subpoena duces tecum, requiring the custodian of library records to appear and present "all records of persons who have checked out the books described in State's application." The State's application requested a long list of titles dealing mainly with witchcraft and related topics.

Shortly after the subpoena was served on the library, Steven Brown, a library card holder, filed a petition for declaratory and injunctive relief alleging the right to an injunction under Iowa Code section 68A.8 (1979). Brown's petition named as defendants the library board and the DCI chief. The suit sought to enjoin the examination

and copying of the library circulation records "absent a showing of compelling State interest" and requested a declaration that disclosure of such records was unconstitutional. The library board then filed its own petition requesting the court to enjoin enforcement of the subpoena and named as defendants the DCI chief and the Polk County Attorney. The two actions were later consolidated, and the library board was recast as a plaintiff.

Upon hearing, the district court entered a decree denying the declaratory and injunctive relief requested and ruled there was an adequate remedy at law: the library board of trustees could assert any defenses it had in a later proceeding to enforce the subpoena.

I. Applicability of Chapter 68A.

Iowa Code section 68A.7 lists the

public records which are to be considered confidential and the requirements for their release:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release information:
>
> ....
>
> 13. The records of a library which, by themselves or when examined with other records, would reveal the identity of the library patron checking out or requesting an item from the library.[1]

This court has previously confronted questions of applicability of chapter 68A. In Iowa Civil Rights Comm. v. City of Des Moines, 313 N.W.2d 491, 494 (Iowa 1980), we were asked to decide whether

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[1] Library records were added to section 68A.7 by amendment after these actions were filed but before the hearing on them in district court. It is not contended, however, that the amendment is inapplicable on retroactivity grounds.

section 68A.7 was applicable to administrative subpoenas. In that case, the City of Des Moines had resisted a subpoena duces tecum from the Iowa Civil Rights Commission, arguing the records sought were exempt from examination under confidentiality provisions of section 68A.7(11). We disagreed, holding that the exemptions of section 68A.7 were "applicable only within the framework of 'every citizen's general right to examine public records under chapter 68A.'" Id. at 495. We likened the commissioner's authority to conduct investigations to that of a grand jury, id. at 495, stating that: to hold otherwise "would contravene the public interest in redressing civil rights violations and frustrate the Commissioner's statutory investigative powers." Id. at 495.

We believe the present case dictates

a similar holding. The county attorney's investigative authority is comparable to and in some instances in lieu of the grand jury. See Iowa Const. amend. [9] (third amendment of 1884); Iowa R. Crim. P. 5(6) (providing county attorney with subpoena power in investigating crime). As such, the county attorney's investigative power must be broad to adequately discharge his public responsibility. See United States v. Calandra, 414 U.S. 338, 343-44, 94 S.Ct. 613, 618, 38 L.Ed.2d 561, 569 (1974); Branzburg v. Hayes, 408 U.S. 665, 701-02, 92 S.Ct. 2646, 2666, 33 L.Ed.2d 626, 651 (1972). To hold otherwise would limit the investigative power of the county attorney, while at the same time allowing administrative agencies to access the same records.

There is an additional basis upon

which a county attorney's subpoena duces tecum will override a claim of confidentiality: the confidentiality statute is inapplicable by its terms if the records are "ordered by a court." Iowa Code § 68A.7. Rule of criminal procedure 5(6) provides that such an order is a prerequisite for the issuance of the county attorney's subpoena, although it is actually issued by the clerk:

> The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense.... Such application and order of approval shall be maintained by the clerk in a confidential file....

(Emphasis added). While it is not clear in this case whether the application was "approved" by the court, the library personnel do not dispute the county at-

torney's claim that the subpoena was obtained in the manner provided by criminal rule 5(c).

Accordingly, we hold that section 68A.7(13) does not prevent execution of a county attorney's subpoena duces tecum.

II. Constitutional Challenge.

Brown and the library board also claimed constitutional protection of their right of privacy, based primarily on the first and fourteenth amendments to the United States Constitution, see N.A.A.C.P. v. Alabama, 357 U.S. 449,460-61, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488, 1498-99 (1958), as well as the fourth and ninth amendments, see State v. Pilcher, 242 N.W.2d 348, 356-57 (Iowa 1976). The effect of forced disclosure of library records would to be chill citizens' reading of unpopular or controversial books because others might learn of it,

according to them, any such inquiry would invade their fourth amendment zone of privacy.

Constitutional privileges against forced disclosure have been recognized in analogous circumstances. The Supreme Court recognized a qualified reporter's privilege based upon the first amendment in Branzburg, 408 U.S. at 680, 92 S.Ct. at 2656, 33 L.Ed.2d at 639; and the president's executive privilege was recognized in United States v. Nixon, 418 U. S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Similarly, this court acknowledged a first-amendment privilege against forced disclosure in Lamberto v. Brown, 326 N.W.2d 305 (Iowa 1982) and in Winegard v. Oxberger, 258 N. W. 2d 47 (Iowa 1977).

These privileges, however, are not absolute; each claim of privilege must

be weighed against a societal need for the information and the availability of it from other sources. Even if we assume, as Brown and the library board urge, that a library patron's privilege exists, based upon the patron's right of privacy, it is only a qualified privilege. We must weigh the effect of forced disclosure of these records against the societal need for the information.

Branzburg and Nixon are closely analogous. They, like the present case, involved claims of privilege in connection with criminal investigations. Branzburg held that a first-amendment privilege claimed by a reporter must be subordinated to the interest of society in well-founded grand jury indictments. Branzburg, 408 U.S. at 685, 92 S.Ct. at 2658, 33 L.Ed.2d at 642. In Nixon, the Supreme

Court refused to apply the executive privilege claimed by the president in response to the government's request for information in a criminal investigation, because of the court's concern for the fair administration of criminal justice. Nixon, 418 U.S. at 711, 94 S.Ct. at 3109, 41 L.Ed.2d at 1066. See also Re Farber, 78 N. J. 259, 273, 394 A. 2d 330, 337, cert. denied, 439 U.S. 997, 99 S.Ct. 598, 58 L.Ed.2d 670 (1978) (refused to apply first-amendment privilege in criminal investigation).

We believe the rationale of these cases controls here. It is true the State's investigation was only preliminary; and as Brown and the library board argue, no suspects were identified nor was the search for information limited to any named library patrons. This does not diminish the need for the informa-

tion, however, as we assume the whole purpose in examining the record was to gain enough information so that the investigation could be narrowed.

The State's interest in well-founded criminal charges and the fair administration of criminal justice must be held to override the claim of privilege here. Brown and the library board have cited no cases to us which have reached a contrary conclusion under similar facts, and we have found none.

III. Oppressiveness of the Demand.

Because disclosure of this information is not barred by our confidential records act, for the reasons discussed in division I, the library's argument that the request is so overbroad and burdensome that it entitles it to injunctive relief under section 68A.8 is inapposite. We do not, however, fore-

close the possibility of obtaining some form of protective order in the future if the demand is in fact unduly burdensome. The record at this point is not sufficient for the court to make that determination.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

STEVEN BROWN, On Behalf of Himself and All Others Similarly Situated,	)	
and	)	No. 67495
BOARD OF TRUSTEES OF THE PUBLIC LIBRARY OF DES MOINES, IOWA, Appellants,	)	
vs.	)	O R D E R
DAN L. JOHNSTON, Polk County Attorney,	)	
and	)	
GERALD SHANAHAN, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, Appellees.	)	

After consideration by the court en banc, appellant Board of Trustees of the Public Library's petition for rehearing in the above-captioned case is hereby overruled and denied.

Done this 10th day of February, 1983.

THE SUPREME COURT OF IOWA

By_____
W. W. Reynoldson, Chief Justice

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